IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

:: O R D E R ::

S.B. CIVIL MISC. APPEAL NO.1395/2004

M/s Premier Poly Film Ltd. & Anr.
Vs.
Shri Shanti Lal

Date of Order :: 12th October, 2006

P R E S E N T

HON'BLE MR. JUSTICE R.S. CHAUHAN
: :

Mr. A.K. Bhandari for the appellants.
Mr. R.P Garg for the respondent.

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BY THE COURT :-

The appellants have challenged the order dated 11.3.2004 passed by the Additional District Judge (Fast Track) No.2, Ajmer (Camp Beawar) whereby the application filed by the appellants under O.9 R.13 of the Code of Civil Procedure (henceforth to be

referred to as 'the Code', in short) was dismissed.

Briefly stated, the facts of the case, are that respondent, Shanti Lal, filed a suit for recovery of Rs.4,21,600/- against the present appellants i.e. M/s Premier Poly Film Ltd. and Mr. Amarnath Goenka in the court of Additional District Judge, Beawar. Subsequently, the case was transferred to the court of Additional District Judge (Fast Track) No.2, Ajmer (Camp Beawar). According to the plaint, the respondent had supplied Calcium Carbonate Calcinite Powder to the appellant-Company under the order dated 21.4.1996 given by the appellant-Company. According to the plaintiff, he had supplied various quantities of material on different dates, and the total amount of the material supplied was worth Rs.5,20,000/-. According to the plaintiff, he was paid a total amount of Rs.2,56,600/-, but an amount of Rs.4,21,600/- was still due. Therefore, the plaintiff sent a notice to the appellant-Company. But, despite the said notice, the appellant-Company did not make the payment of the said amount. Therefore, the plaintiff filed the suit for recovery of the said amount. The said suit was

filed on 30.5.1998. However, as the appellant-Company became sick, it submitted a reference before the Board for Industrial and Financial Reconstruction (BIFR) under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (henceforth to be referred to as 'the SIC Act', in short) on 6.6.1998. Vide order dated 21.1.1999, the BIFR declared the appellant-Company as a sick Company in terms of Section 3(1)(o) of the SIC Act. Meanwhile, in the suit filed by the respondent, the notices were issued to the appellants on 6.10.1998. On 6.7.1998, the counsel for the plaintiff requested the trial court to send the summons by Registered A.D. Therefore, the trial court directed that in case the additional summon forms, copy of the plaint and registry charges are filed, then the notices may be issued by Registered A.D. On 6.10.1998, it was found that the summons have not been issued. Therefore, it was directed that summons be issued for 5.12.1998. On 5.12.1998 again, the summons were issued for 3.2.1999. On 3.2.1999 again, notices were issued for 8 .4.1999. Again on 8.4.1999, it was discovered that summons were not issued. Again, the summons were

directed to be issued for 24.5.1999; even then, the summons were not issued. Therefore, on 15.7.1999, it was directed that the summons be issued for 31.8.1999. On 15.7.1999, the summons were issued, but the same were not received after service. Therefore, vide order dated 31.8.1999, the trial court ordered that the process fee, summon forms, copy of the plaint and registry charges be filed and notices be issued for 15.12.1999. On 15.12.1999, the Presiding Officer was on leave and the summons were also not received. Therefore, the matter was posted on 15.1.2000. Unfortunately, on 15.1.2000, the court staff was on strike, therefore, the case was posted for 24.4.2000. On 24.4.2000, the learned court observed that the Registered A.D. was issued on 8.9.1999 for defendant’s appearance on 15.12.1999. Although the A.D. was not received back, but a presumption can be drawn that the said notice has been received by the defendant. Since the defendant did not appear before the court, the ex-parte proceedings were initiated. The case was fixed for plaintiff’s evidence on 11.12.2000 till August 2002. For final arguments ex-parte, the case was adjourned till March, 2003. On 14.5.2003, the case was

transferred to the court of Addl. District Judge (Fast Track) No.2. However, no notice whatsoever was sent to the defendant informing him about the transfer of the case from the court of Addl. District Judge, Beawar to the court of Addl. District Judge (Fast Track) No.2. On 19.5.2003, the case was registered in the court of Addl. District Judge (Fast Track) No.2, and on the same date the suit was decreed for an amount of Rs.4,21,600/- with interest @ 21% per annum from 30.5.1998 till recovery. According to the appellants, they were never served with notices or summons. For the first time, on 8.11.2003, they came to know about passing of the ex-parte judgment and decree. Hence on 27.11.2003, they filed an application under O.9 R.13 of the Code for setting aside the judgment and decree dated 19.5.2003. After hearing both the parties, the learned Judge has dismissed the said application. Hence this appeal before this Court.

Mr. A.K. Bhandari, the learned counsel for the appellants has vehemently argued that the court has relied upon the provisions of O.5 R.19-A(2). However the said provision was deleted by the Code of

Civil Procedure (Amendment) Act, 1999 (46 of 1999). Even if such presumption can be drawn, it was the duty of the plaintiff to first prove that the summons were properly addressed, prepaid and duly sent by the registered post and acknowledgment due (A.D.). However, there is no evidence on record that the envelope containing the summons was properly addressed and duly sent by the registered post. In fact, no affidavit to this effect had been filed by the appellants. In the absence of any evidence, the said presumption cannot be drawn by the court. Secondly, the case was transferred from the court of Additional District Judge, Beawar to the court of Additional District Judge (Fast Track) NO.2, Ajmer (Camp Beawar), but no notice was sent to the defendant informing him about transfer of the case from one court to the other. Therefore, in the absence of any such notice, the defendant was prevented from appearing before the trial court. Lastly, since the summons were not duly served on the appellants, they were not in a position to bring to the notice of the trial court, the fact that vide order dated 21.1.1999, the BIFR had declared the appellant-Company as a sick Company. It is well

settled that once a Company has been declared as a sick Company under Section 22 of the SIC Act, no legal proceeding or suit for recovery against the sick industry shall lie or be proceeded with, except with the consent of the BIFR. In view of this statutory provision, civil suit filed by the plaintiff was neither maintainable, nor the court had jurisdiction to proceed with the said suit and pass a money decree against the appellants. Thus, in the light of the said order, the very maintainability and continuation of the trial becomes questionable.

On the other hand, Mr. R.P. Garg, the learned counsel for the respondent has argued that in fact, O.5 R.19-A stood deleted w.e.f.1.7.2002. However, when the presumption was made by the learned court on 24.9.2000, the said provision was very much in existence. Therefore, the learned Judge had validly drawn the said presumption. He has further argued that there is no requirement under the law that prior to transferring the case from one court to another, a notice has to be sent to the defendant. Therefore, no illegality has been committed by the Addl. District

Judge while transferring the case to the court of Addl. District Judge (Fast Track) No.2. Hence, he supports the impugned order.

We have heard both the counsels. A bare perusal of the record, which is available before this Court, clearly reveals that on 8.9.1999 summons were sent by Registered A.D. The postal slip clearly shows that summons were sent to the appellants. However, no A.D. was ever received back by the court.

Prior to its deletion, O. 5 R. 19-A stood as under :-

> "19-A. *Simultaneous issue of summons for service by post in addition to personal service.*- (1) The Court, shall in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:
>
> Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.
>
> (2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or postal article

containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons"

Thus, the said presumption has been validly drawn by the court, even in case, the acknowledgment due has not been received back by the court. Hence, the learned court was justified in drawing the presumption under O. 5 R. 19-A of the Code.

Looking to its relevance in the present case, O. 9 R. 13 of the Code reads as under :-

"**Setting aside decree *ex parte* against the defendant.-** In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks

fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendant also :

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

A bare perusal of this provision clearly reveals that in case the defendant satisfies the court that because of sufficient cause he was prevented from appearing before the court, the court shall make an order setting aside the decree upon such terms as to costs, as it thinks fit. Thus, O.9 R. 13 bestows sufficient discretion on the court to restore the case, and to give opportunity of hearing to the defendant.

In the present case, the issue is not only about the sufficient cause being shown by the defendant, but also about the very maintainability of the suit in the light of the order passed by the BIFR. Once a legal protection has been granted under the SIC

Act, the issue needs to be decided by the trial court. Since the appellant-Company is a sick Company, before a liability can be imposed upon the appellant-Company, an opportunity of hearing should be given to the Company, especially when the continuation of the proceeding is barred by Section 22 of the SIC Act.

The right of hearing is not only part of the principles of natural justice, but also has been given by the statute and the Constitution of India. Therefore, the said right should not be brushed aside lightly. In the case of **N. Balakrishnan V. M. Krishnamurthy (AIR 1998 SC 3222)**, the Hon'ble Supreme Court has held that the Court should lean towards granting opportunity of hearing. Recently in the case of **Vegepro Foods & Feeds Ltd., V. M/s. Jagannath Shreelal & Sons (S.B. Civil Misc. Appeal No.338/2001, decided on 21.8.2006)**, this Court has also held that in case the defendant is vigilant and immediately submits application under O. 9 R. 13 of the Code, or in case the summon has not been received by him, the ex-parte proceeding should be set aside.

Therefore, we quash and set aside the order

dated 11.3.2004 and allow the application of the appellants under O. 9 R. 13 of the Code. We also set aside the judgment and decree dated 19.5.2003, and direct the learned court to grant opportunity of hearing to the appellants provided they pay cost of Rs.30,000/- to the respondent. Since the case has been hanging fire since 1998, the trial court is directed to decide the case within a period of six months from the date of receipt of the record from this Court. The appellants are also directed to appear before the trial court on 6.11.2006. The trial court is further directed to record the evidence on day-to-day basis; the parties are directed to co-operate with the trial court for early decision of the case within the stipulated period of six months.

With these directions, this appeal is allowed.

[R.S. CHAUHAN], J.

Skant/-